

Message

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Sent: 8/8/2018 7:15:52 PM
To: McGill, Thomas [McGill.Thomas@epa.gov]
CC: Calli, Rosemary [Calli.Rosemary@epa.gov]; Hicks, Matt [Hicks.Matthew@epa.gov]; Ghosh, Mita [Ghosh.Mita@epa.gov]; Mancusi-Ungaro, Philip [Mancusi-Ungaro.Philip@epa.gov]
Subject: RE: assumption state rulemaking and EPA review timeframes

Tom – Please revise this as we discussed yesterday to highlight our need to notice and hold a hearing and have a 45 day comment period. Then include as a second bullet that during the 120 day review timeframe – we are required to give the corps and services 90 days to review.

jmg

From: McGill, Thomas
Sent: Tuesday, July 31, 2018 5:30 PM
To: Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>
Cc: Calli, Rosemary <Calli.Rosemary@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Ghosh, Mita <Ghosh.Mita@epa.gov>; Mancusi-Ungaro, Philip <Mancusi-Ungaro.Philip@epa.gov>
Subject: assumption state rulemaking and EPA review timeframes

Jeaneanne – Please see the information below about timeframes in the State’s rulemaking process, their submission of an assumption package and the EPA’s review. As highlighted below, challenges to their rule could potentially delay their rulemaking process by several months. If you have any questions or need any additional information please let us know.
Tom

State Rulemaking Process

- The public comment period for FDEP’s draft 404 assumption rules ends on July 31.
- FDEP’s Notice of Proposed Rule (NOPR) is tentatively targeted to be noticed for public review/comment on Aug 21, which could be subject to change.
 - o **NOPR process could end as early as Sep 18, but could potentially be significantly delayed as described below.**
 - o FDEP currently intends to submit their proposed rule to the Office of Fiscal Accountability and Regulatory Reform (OFARR) by Aug 14, which could be subject to change.
 - o NOPR is published for a 21-day period, 7 days after receipt by OFARR.
 - o FDEP could receive a request for a public hearing, which would likely be scheduled within a week following the end of the 21-day period.
 - o Outcome of NOPR could be either “No Change” or a “Notice of Change”. A “Notice of Change” would trigger restarting the NOPR process.
 - o Depending on comments received, the Notice of Change could potentially occur multiple times during the rulemaking process.
 - o Florida administrative procedures allow the public to challenge the rule during the NOPR process.
 - If the NOPR is challenged, an Administrative Law Judge with the Department of Administrative Hearings (DOAH) would need to set a hearing, and ultimately issue an order.
- If the NOPR is not challenged and the outcome of the process is “No Change”, FDEP would file the final rule with the Secretary of State.
 - o The FDEP’s rule becomes effective 30 days after the rule is filed with the Secretary of State’s office.
 - o Florida administrative procedures allow the public to challenge a rule any time after the rule becomes effective, which would lead to an ALJ scheduling a hearing and ultimately issuing an order.

- If the rule is challenged at any time and the DOAH were to issue an order upholding the rule, the public could appeal the decision to the State District Court of Appeals. Under such a scenario, the rule will be effective unless the ALJ or District Court of Appeals issues a stay.
- In summary, **the State's rulemaking process could be completed as early as September 18 or as late as sometime in 2019.**

Submission of a Complete Package

- The State's submission of a complete package may take as much as a month following the completion of the State's rulemaking process.
 - o The State will need some time to ensure consistency between their final rules and other parts of the submission package (e.g., Applicant's Handbook, Attorney Generals' statement, description of their program).

EPA's review of a Complete Assumption Package

- Regulations provide that EPA has 120 days to review an assumption package, unless the State/EPA agree on a longer timeframe.
- **Regulations require that during this period EPA provide the Corps of Engineers, the U.S. Fish and Wildlife Service and the NOAA Fisheries Services 90 days to review** and provide comment on the State's assumption package.
 - o The amount of time needed for EPA's review will also need to account for time needed to fully consider any federal comments received prior to taking action on the State's assumption package.
- Other required steps during the EPA's review period (i.e., 45-day public comment period, hosting a public hearing) could occur during the above 90-day federal review period.